Supreme Court, U.S.
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No. 03-310

In The

Supreme Court of the United States

JAMES B. TWISDALE,

Petitioner

v.

JOHN W. SNOW, Secretary of the Treasury,

Respondent

On Writ of Certiorari to the
Untied States Court of Appeals
For the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

JAMES B. TWISDALE
103 E. MCCLURE DR.
SCOTT DEPOT, WV 25560
304-757-4738
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QUESTIONS PRESENTED FOR REVIEW

Introduction to Question 1

The Seventh Circuit ruled that the protection offered under *42 U.S.C. 2000e-3(a)* is restricted to only employees who have made a charge of discrimination. Stating that the issue "is both clean and novel" and no case law or scholarly commentary existed. Case law and scholarly commentary does exist, all of which supports a literal and all inclusive interpretation as intended by Congress.

1. Does the protection offered under Section *42 U.S.C. 2000e-3(a)* for employees who have made a charge, testified, assisted, or participated in any manner in an EEOC investigation apply to all employees with no regard to their role in the alleged acts of a Title VII violation?

Introduction to Question 2

The Seventh Circuit in its analysis of a hostile work environment did not apply the standards established by the Supreme Court in the cases of *Harris v. Forklift Systems, Inc* and more recently *Oncale v. Sundowner Offshore Services, Inc.* correctly. The court below further imposed new criteria that subsequent job assignments and a promotion will cancel out any previous inflicted harassment.

2. Did the Plaintiff suffer a hostile work environment sufficient to affect his compensation, terms, conditions, or privileges of employment, under *42 U.S.C. 2000e-2(a)(1)* and if so, would other job assignments, performance bonuses and a promotion cancel out the harassment?

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ARGUMENT

THE SEVENTH CIRCUIT ERRED IN INTERPRETING AND APPLYING 42 U.S.C. 2000e-3(a)

The Petitioner is pleased that the Respondent concurs with his position on the correct interpretation of *42 U.S.C. 2000e-3(a).* There is no further need to argue this matter.

The Respondent believes resolution by the High Court of this issue, an issue they admit the petitioner is correct on, would be "premature". Resp. P5. Their reason is that "the Seventh Circuit may revisit the issue once it recognizes the mistaken assumptions on which it based its decision." Resp. P6. With all due respect, permitting a known and admitted injustice is an injustice in itself. We teach our children "two wrongs do not make a right". But there are more compelling reasons for the High Court to rectify this wrong. What if the Seventh Circuit does not self correct its decision? What if it takes another 10 years before an opportunity for such a correction can present itself? To allow a known and admitted incorrect decision at the Appellate level stand will have wide ramifications. For example, cases like Mr. Twisdale's will never even reach the Seventh Circuit because its very own decision will discourage plaintiffs and attorneys to raise the issue. Furthermore, attorneys will discourage clients from pursuing their rights under Title VII if they believe their client is not protected. Jobs and careers could be lost and lives disrupted. Finally, an unresolved conflict in the circuits can only lead to greater conflict and confusion.

As a second reason for not accepting the case the Respondent claims the Plaintiff will still fail because the acts of retaliation do not meet an "adverse employment action" and the acts of harassment were not "severe or pervasive" as "to alter the conditions of employment and create an abusive working environment". Resp. P12 & 13. Furthermore, the Respondent claims the lower courts decisions do not "conflict with any decision of this Court or of any court of appeals". Resp. P 6. The Plaintiff disagrees for the reasons already argued in his Petition and further discussed in the second argument of this Reply.

ARGUMENT

THE SEVENTH CIRCUIT ERRED IN INTERPRETING AND APPLYING 42 U.S.C. 2000e-2(a)(1)

The Respondent does not refute the arguments made and facts presented by the Plaintiff in his Petition. Rather they only concur with the lower courts decisions. They concur that the acts of retaliation against the Plaintiff "do not amount to an adverse employment action". Resp. P13. And that the same acts for harassment purposes are not "severe or pervasive" as "to alter the conditions of [the victim's] employment and create an abusive working environment" *Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986); see Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)....* Resp. P13 & 14. The Respondent goes on to call the acts of retaliation/harassment as "garden-variety personnel gripes and do not amount to a change in 'terms' or 'conditions' of employment". In support of this they cite the same three cases used by the Court below *(Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976, 978 (7th Cir. 2000)(collecting cases) and Andrews v. City of Phildelphia, 895 F.2d 1469, 1483 (3d Cir. 1990)); see also Oncale v. Sundowner Offshore., Inc., 523 U.S. 75, 81-82 (1998).* Resp. P14.

Analysis of Respondent Cited Cases

Assessment of the three latter cases reveals acts of harassment different from what the Plaintiff experienced and conclusions unsupportive of their point. In the case of *Andrews v. City of Philadelphia*, the facts and outcome resulted in the Third Circuit vacating and remanding the case for further consideration on the Title VII harassment claims; clearly favoring the Petitioner in the instant case. In *Oncale*

v. Sundowner Offshore., Inc. the case was remanded by the High Court because the Fifth Circuit erred in concluding that same sex harassment was not actionable under Title VII. It also reiterated it's holding in *Harris v. Forklift Systems, Inc., 510 U.S. (1993)* that "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" It would appear that in the Seventh Circuit's haste to dismiss Mr. Twisdale's case, the rule of law may not have been fully considered and other mistakes made as in the first issue of "protection".

A brief analysis of each of the above three cases will help explain the Petitioners comments. In *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson,* the acts of harassment only amounted to four brief comments from the supervisor of a sexual nature. There is no similarity to the instant case. Further, the case was remanded by the Seventh Circuit because the act of terminating the petitioner's employment met the retaliation standard. In *Andrews v. City of Phildelphia* the lower courts decision was vacated and the case remanded because the harassment standards were met. Judge Rosenn of the Third Circuit wrote:

> Thus, in reconsidering this factor on remand, the trial judge should look at all of the incidents to see if they produce a work environment hostile and offensive to women of reasonable sensibilities. The evidence in this case includes not only name calling, pornography, displaying sexual objects on desks, but also the recurrent disappearance of plaintiff's case files and work product, anonymous phone calls, and destruction of other property. The court should view this evidence in its totality, as described above, and reach a determination.

This case is much more similar to Mr. Twisdale's because they both had to endure acts of harassment for an extended period of time, acts that would offend if not frighten (as in Mr. Twisdale's case) the "sensibilities" *(Id.)* of a "reasonable person" (*Oncale v. Sundowner Officeshore Services, Inc. 523 U.S. 75 (1998)).* Furthermore, the acts were numerous, severe and pervasive, just as in the instant case.

In *Oncale v. Sundowner Offshore., Inc.* the petitioner was forcibly subjected to sex-related, humiliating actions, physically assaulted in a sexual manner and threatened with rape. All of which lead the petitioner to quit. The High court concluded that same sex discrimination consisting of same-sex sexual harassment (the only issue before it) was actionable under Title VII and remanded the case for further proceedings. This case like the one before favor Mr. Twisdale. The High Court could have decided on the acts of harassment but did not have to because the acts met the standards as established in *Harris v. Forklift Systems, Inc., 510 U.S. (1993).* The acts against Mr. Twisdale were also "humiliating" such as February 10th meeting to intimidate, the numerous (156 times) denied acting assignments, and removal from an acting assignment. Although not physically assaulted, the criminal investigation could have resulted in Mr. Twisdale's imprisonment and the various unprecedented and unauthorized audits could have also ended in his removal, and the threatened rape like Mr. Roger's threat to remove Mr. Twisdale's staff in his Disclosure Office are similar only in that they are threats designed to intimidate and frighten. However, the threat against Mr. Twisdale was eventually carried out when several months later the Disclosure Office was removed from his responsibilities.

Standard for Harassment - Summary

Audits of program areas where the requesting official could not produce a single business reason for requesting it and where the request was unauthorized and unprecedented, retaliatory criminal investigations, threats, removal of responsibilities, and numerous denied acting assignments can not be considered by a "reasonable person" *(Oncale v. Sundowner Officeshore Services, Inc. 523 U.S. 75 (1998))* as a "garden-variety personnel grip". When organizational resources are brought to bear through the deliberate misuse of IRS authority, then the "terms" or "conditions" of employment have been instantly changed. Simply put, "reasonable person(s)" do not sign on with an expectation that the employer will subject them to unauthorized and/or unjustified activity.

To maintain the standard that harassment must result in poor performance, removal from a position or job, resignation or an adverse action is not balanced with real life. Some people perform at a higher level when faced with adversity, stress or confrontation. Policemen, fireman, soldiers, etc. may find themselves in situations where they must either act or run for safety. When they choose to act their deeds are sometimes called heroism. In Mr. Twisdale's case he chose to act. He volunteered for as many assignments as possible and raised the level of his performance in an attempt to counter the on going harassment. The bonuses and promotion received were not in payment for the harassment inflicted. To imply this as the Seventh Circuit has only reflects a judicial body out of touch with reality.

As indicated in footnote 3 on page 13 of the Respondent Brief, the Respondent realizes the injustice of the lower courts' decision and the potential impact it may have if allowed to stand. The Petitioner like the United States would

not object that the "proper course would be to grant, vacate, and remand the decision below..."

The Seventh Circuit has not followed the standards set by the High Court. Rather as it did with the first issue of "protection", it elevated and rewrote the standard for harassment to a near impossible level and one inconsistent with the decisions of the High Court.

Adverse Employment Action - Not an Issue

The Respondent states that the district court "held that the 'actions of which [petitioner] complains do not amount to an adverse employment action'". Resp P13. In the sense that such an action required the Petitioner's termination, demotion or some form of discipline then they are correct. However, the Court below did not find against the petitioner for not meeting a standard for an adverse employment action in regards to the Retaliation argument. Rather, its entire focus was on the protection clause under *42 U.S.C. 2000e-3(a)*. The Petitioner asks the High Court that this issue not be considered since the court below made no decision on its merits.

Circuits are widely divided on the Interpretation of an Adverse Employment Action

In the event this is an issue, it is the Petitioners position that the federal judicial circuits are widely divided as to what qualifies as an adverse employment action. The standards range from a narrow definition focusing on the "ultimate employment decision," to a very broad and liberal definition of a decision affecting some term or condition of employment.

The Fifth and the Eight Circuits have followed the holding in *Page v. Bolger (645 F.2d 227 (4th Cir.1981)(en banc),*

cert.denied, 454 U.S.892 (1981)) both requiring an ultimate employment decision to trigger Title VII. In *Dollis v. Rubin (77 F.3d 777 (5th Cir. 1995))* the Fifth Circuit held that "*Title VII* was designed to address ultimate employment decisions. The Eight Circuit in *Ledergerber v. Stangler (122 F.3d 1142 (8th Cir. 1997))* likewise mandated that an adverse employment action must "rise to the level of an ultimate employment decision" to trigger *Title VII.* The most recent break with this restrictive standard came from the Ninth Circuit in *Ray v. Henderson (217 F.3d 1234 (9th Cir. 2000)).* In reaching its conclusions, the Ninth Circuit cited *42 U.S.C. 2000e-3(a),* the retaliation statute, which states "it is unlawful 'for an employer to discriminate' against an employee in retaliation for engaging in protected activity." The *Ray* court further opined that the statutory language to bring a retaliation suit "does not limit what type of discrimination is covered, nor does it prescribe a minimum level of severity for actionable discrimination." The Ninth Circuit concluded that *42 U.S.C. 2000e-3(a)* does "not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion." *Ray v. Henderson quoting Passer v. Chem. Soc., 935 F.2d 322, 331 (D.C. Cir. 1991).* The Equal Employment Opportunity Commission (EEOC) sets forth this same standard. Circuits using the broadest definitions—the First, Seventh, Tenth, Eleventh, and D.C.—have taken an expansive view of the type of actions that can be considered adverse employment actions. The Second and Third hold an intermediate position: "an adverse action is something that materially affects the terms or conditions of employment." *Ray v. Henderson at 1242 (citing Torres v. Pisano, 116 F.3d 625, 640 (2d Cir. 1997); Roberson v. City of Pittsburgh, 120 F. 3d 1286, 1300 (3d Cir. 1997)).*

Petitioner Meets the Seventh Circuit's Retaliation Standard

Recently in *Siegfried Herrnreiter v. Chicago Housing Authority (315 F.ed 742 2002)* the Seventh Circuit opined its reasoning as to what qualifies as retaliation.

> We do not mean to suggest ... that retaliation, to be actionable under Title VII (or other statutes), has to involve an adverse employment action. It does not. *Aviles v. Cornell Forge Co., 183 F.3d 598, 605-06 (7th Cir. 1999), Aviles v. Cornell Forge Co., 241 F.3d 589, 593 (7th Cir. 2001); Passer v. American Chemical Society, 290 U.S. App. D.C. 156, 935 F.2d 322, 331-32 (D.C. Cir. 1991); EEOC Compliance Manual 8, P 8008 (1998)(directive No. 915.003); see also Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 891-92 (7th Cir. 1996).* Some cases reach this conclusion by interpreting "adverse employment action" in the retaliation context as not requiring an actual employment action; an example is *Berry v. Stevinson Chevrolet, 74 F.3d 980, 986-87 (10th Cir. 1996),* where the retaliation took the form of preferring charges of theft and forgery against an employee who had filed a charge of discrimination. See also *Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000).* As we explained in *McDonnell v. Cisneros, 84 F.3d 256, 258-59 (7th Cir. 1996).* "No limiting language appears in *Title VII's* retaliation provision. *42 U.S.C. 2000e-3(a).* The language of 'materially adverse employment action' that some courts employ in retaliation cases is a paraphrase of *Title VII's* basic prohibition against employment discrimination, found in *42 U.S.C. 2000e-2(a)(1) and (2)*... The provision regarding retaliation may intentionally be broader, since it is obvious that

effective retaliation against employment discrimination need not take the form of a job action."

It is the Petitioner position that the Court below stopped its analysis of the retaliation argument when it denied Mr. Twisdale protection under *42 U.S.C. 2000e-3(a)*. If it had reviewed the acts of harassment in the light of retaliation then Mr. Twisdale would have certainly prevailed given the above reasoning. To further illustrate, the above case of *Berry v. Stevinson* survived the retaliation standard when the plaintiff was charged with theft and forgery by the employer. This is no different than the instant case were IRS management made charges against Mr. Twisdale involving a serious breach of security, abuse of authority, and for making an unauthorized disclosure, all or any of which could have resulted in his termination or imprisonment. Furthermore, these same allegations lead to a criminal investigation against the Petitioner.

Conclusion

For the foregoing reasons, the judgement of the Seventh Circuit should be reversed and the case remanded for trial on the Retaliation and/or Harassment charges.